IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 20, 2009

RODRIGUES D. PRUITT v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-B-1094 Cheryl Blackburn, Judge

No. M2008-00915-CCA-R3-PC - February 5, 2010

After a jury trial, Petitioner Rodrigues D. Pruitt was convicted of possession of .5 grams or more of cocaine with intent to sell or deliver and was sentenced as a career offender to thirty years incarceration.[1] His conviction and sentence were affirmed on direct appeal. He then filed the present petition for post-conviction relief, which the post-conviction court denied. He now appeals, claiming he was denied his constitutional rights to the effective assistance of counsel and to a fair trial. Upon review of the record and the parties' briefs, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Paula Ogle Blair, Nashville, Tennessee, for the appellant, Rodrigues D. Pruitt.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

A. Trial

[1] The record reflects that Petitioner was indicted under the name Rodrigues D. Pruitt along with the aliases Rodriguez D. Pruitt and Rodriquez D. Pruitt.

Our decision in Petitioner's direct appeal provides a lengthy recitation of the facts. See State v. Rodrigues D. Pruitt, No. M2005-01862-CCA-R3-CD, 2006 WL 2682822, at *1-3 (Tenn. Crim. App. at Nashville, Sept. 8, 2006). In brief, we summarize the facts as follows:

Metro Nashville Police Officer Johnnie Melzoni was on patrol in a public housing project when he saw Petitioner standing alone in a grassy area off a sidewalk. Officer Melzoni noticed a car parked on the street next to Petitioner and saw that the car was parked far from the curb, causing a traffic hazard. Officer Melzoni approached the Petitioner, intending to issue a criminal trespass citation. As he neared, Officer Melzoni asked to speak to Petitioner. Petitioner agreed. Officer Melzoni asked Petitioner if he was a resident at the housing project or visiting a resident. Petitioner said he was not a resident, but he was visiting his grandmother who lived around the corner. Petitioner then informed Officer Melzoni that he arrived at the housing project in the car mentioned above. Officer Melzoni looked in the car's window and saw marijuana. When Officer Melzoni asked permission to search the car, Petitioner said the car was his girlfriend's, not his, and then denied that he arrived in the car. Officer Melzoni then searched the vehicle and found more marijuana, as well as 4.8 grams of cocaine base. Petitioner denied the drugs were his.

Petitioner was indicted on charges of possession of cocaine with intent to sell, possession of marijuana, and criminal trespassing. His trial counsel filed an unsuccessful motion to suppress the evidence from the car as well as certain statements Petitioner made to police. At trial, one of the State's witnesses was William Mackall, a sergeant in the Metro Police Department's Specialized Investigation Division. Sergeant Mackall's only testimony in the case concerned the typical profile of drug dealers and drug transactions. He was accepted by the trial court as an expert in those fields. Notably, neither Petitioner's grandmother or his girlfriend testified at trial.

The jury found Petitioner guilty on the cocaine possession count. The remaining two counts were dismissed. Significantly, the trespass count was dismissed prior to trial. Petitioner was sentenced to thirty years, and this court affirmed his conviction on direct appeal.

B. Post-Conviction Proceedings

After concluding his direct appeal, Petitioner filed the present petition for post-conviction relief. He was appointed counsel, and the post-conviction court held a hearing on January 23, 2008. Only two witnesses testified: Petitioner and his trial counsel.

Petitioner testified that he believed trial counsel performed adequately in many areas but that his representation was wanting in a few specific respects. First, trial counsel did not call Petitioner's grandmother, Ella Taylor, to testify. According to Petitioner, Ms. Taylor would have testified that she lived in the neighborhood and Petitioner was her guest just prior to his arrest. Petitioner further testified that trial counsel had anticipated calling Ms. Taylor but decided not to when the State dropped the trespass charge. Petitioner acknowledged that Ms. Taylor's testimony would not have had a direct impact on the possession charge, but he nevertheless thought it was important for the jury to hear Ms. Taylor testify that he was not simply loitering around the neighborhood selling drugs. However, during cross-examination, Petitioner testified that he did not think trial counsel should have called Ms. Taylor after the trespass charge was dropped:

Q. So the trial was about whether or not you possessed these drugs with intent to sell or deliver, right?
A. Right.
Q. So how would calling your grandmother affected what the jury had to decide?
A. Well, it wouldn't have. But it would have made another difference.
Q. Okay. So you don't think it would have – if it wouldn't have affected how the jury was going to decide this case, then why is it ineffective for not putting her on?
A. Because my grandmother should have been there for my trial.
Q. Just so she could say that he was over there visiting me that day?
A. Yes.
Q. Okay. Well, I dismissed the trespass before the trial, correct?
A. Yes.
Q. So your grandmother would have had some bearing on that charge, correct?
A. Yeah.
Q. But that charge went away, right?
A. Right.
Q. So did you disagree then with [trial counsel] not calling her even after –
A. No.
Q. So you didn't think he should have called her either?
A. No, not at that point.
Q. Okay. Then why are you arguing about whether he should have brought her in or not? You're not really arguing about that, are you?
A. No.

Petitioner never expanded on what he was "really" arguing.

Petitioner also testified that trial counsel should have called his girlfriend, Donell Gordon. Ms. Gordon, Petitioner explained, was the owner of the car in which Officer Melzoni found the drugs. Petitioner claimed that he borrowed the car from her. Petitioner also said Ms. Gordon would have testified that she did not receive a ticket as a result of Officer Melzoni's stop. On cross examination Petitioner acknowledged that he actually did not know what Ms. Gordon would have said in her testimony. Indeed, the following dialogue summarizes what Petitioner knew regarding how Ms. Gordon would have testified:

> Q. Okay. Now, Ms. Gordon. What do you think she was going to say if she had been brought to trial?
> A. She wasn't. She wasn't brought to trial, so I don't know what she would have said.
> Q. Okay. You don't have any idea of what she would have said?
> A. No.
> . . . .
> Q. Okay. Well, did you – did you discuss with [trial counsel] about Ms. Gordon at all?
> A. About calling her, yeah.
> Q. Okay. What was that discussion?
> A. He wasn't sure if we needed her or not. He wanted to see how it was going to go.
> Q. Okay. I don't think there was any dispute at trial that the car belonged to her, correct?
> A. Right.
> Q. Okay. But you don't have any idea what she was going to say, and you don't know still today what she would say if she had come?
> A. No. I can't speak for her.

Finally, Petitioner testified that his trial counsel failed to adequately cross examine the State's expert witness, Sergeant Mackall. According to Petitioner, trial counsel was unable to fully cross-examine Sergeant Mackall because of trial counsel's prior professional relationship with Sergeant Mackall. However, at the hearing, Petitioner admitted that he agreed to trial counsel's representation despite the disclosure of his relationship with Sergeant Mackall. Furthermore, Petitioner was unable to provide any specifics as to how he thought trial counsel should have cross-examined Sergeant Mackall. Another snippet from the post-conviction hearing captures Petitioner's testimony in this area:

Q. Okay. With regard to this cross-examination of Sergeant Mackall by [trial counsel] because [trial counsel] had represented Sergeant Mackall on some other matter, didn't [trial counsel] bring that to the Court's attention and you decided that you wanted to go ahead with [trial counsel's] representation despite that?
A. Right.
Q. Okay. All right. Then why are you complaining about it now?
A. Because [trial counsel] didn't ask him everything he should have asked.
Q. What is it that he didn't ask that he should have asked?
A. I don't know what it is he couldn't ask him or didn't want to ask him. Only he know that.
Q. Okay. He cross-examined him about –
A. But not to the fullest.
Q. Okay. Well, you're saying "not to the fullest." I want to know what it is he left out.
A. Only [trial counsel] know that, what he left out.
Q. So it's just some broad thing that you don't even have any specifics about –
A. Exactly, when it come to my life.

Petitioner's trial counsel also testified at the post-conviction hearing. Counsel testified that he was an experienced criminal defense lawyer; at the time of the post-conviction hearing he was in his thirtieth year of practice.

Trial counsel testified that he considered calling Ms. Gordon but that he did not believe she would testify that the drugs belonged to her. He was particularly fearful that she might further implicate Petitioner by saying that he was in sole possession of the car at the time Officer Melzoni found the drugs. As a result, he chose not to call Ms. Gordon.

With respect to Sergeant Mackall, trial counsel explained that the sergeant was a named defendant in a federal suit claiming he used excessive force when he shot a dog during the execution of a drug-related search warrant. Sergeant Mackall had been represented by Metro Legal Department but an issue arose regarding potential conflicts from the Department simultaneously representing him, individually, and the police department as an entity. Sergeant Mackall came to trial counsel seeking advice.[2] Trial counsel discussed the matter with Sergeant Mackall and referred him to an attorney in counsel's office who

[2] Sergeant Mackall came to trial counsel when the excessive force suit was on appeal in the United States Court of Appeals for the Sixth Circuit. The record is unclear about the date of that meeting or even when the case arose.

specialized in civil rights actions. Trial counsel said the case was dismissed, but he was not sure if the dismissal occurred before Petitioner's trial. Regardless, he disclosed the situation to Petitioner before Petitioner's trial.

Trial counsel did not question Sergeant Mackall about the allegations in the federal lawsuit and did not think such questions would have been permitted by the trial judge. He did not think there was a valid argument about the admissibility of such evidence because the alleged use of excessive force was not relevant to Sergeant Mackall's expert testimony regarding drug dealer profiles. While he conceded the lawsuit might have some connection to Sergeant Mackall's credibility, he said that Sergeant Mackall's testimony was not about the execution of search warrants, so even that would have been a stretch.

After the post-conviction hearing, the court issued a written order denying relief. With respect to the issues Petitioner raises on appeal, the post-conviction court concluded that Petitioner failed to show ineffective assistance of counsel. First, the court found that the absence of testimony from either Ms. Taylor or Ms. Gordon precluded the court from evaluating their potential impact on the case. Furthermore, the court noted that, based on the information trial counsel had about their potential testimony, the testimony was either irrelevant or would not have made any difference at trial. With respect to Sergeant Mackall's cross-examination, the court credited trial counsel's testimony. It noted that the potential line of questioning about the federal suit was unrelated to the trial and, moreover, trial counsel's prior relationship with Sergeant Mackall did not impact his ability to conduct a cross-examination. Further, the post-conviction court rejected Petitioner's theory that the questions would have created an issue regarding Sergeant Mackall's credibility.

On appeal, Petitioner asserts three bases for his claim of ineffective assistance of counsel. He claims his trial counsel was constitutionally ineffective because he (1) did not call Petitioner's grandmother, Ms. Taylor, as a witness at trial; (2) did not call Ms. Gordon as a witness at trial; and (3) did not fully cross examine the prosecution's expert witness, Sergeant Mackall, due to a prior professional relationship between trial counsel and the witness. In addition, he raises a general issue regarding the denial of a fair trial, which he claims also arises from trial counsel's prior relationship with Sergeant Mackall. None of these arguments are persuasive.

II. Analysis

Petitioner's primary contention on appeal is that he was denied his constitutional right to the effective assistance of counsel. To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "'Clear and

convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). In Fields v. State, our supreme court explained the standard of review in cases of ineffective assistance of counsel:

> [A post-conviction] court's *findings of fact* underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. However, a [post-conviction] court's *conclusions of law*–such as whether counsel's performance was deficient or whether that deficiency was prejudicial–are reviewed under a purely *de novo* standard, with no presumption of correctness given to the [post-conviction] court's conclusions.

40 S.W.3d 450, 458 (Tenn. 2001) (citations omitted; emphasis in original).

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). A petitioner demonstrates prejudice when he shows that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Moreover,

> [b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the

> ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069).

We conclude that trial counsel was not ineffective when he declined to call Petitioner's grandmother as a witness. As the post-conviction court noted, Ms. Taylor did not testify at the post-conviction hearing; therefore, we are left to speculate about what she would have said had she been called to testify. Generally, a petitioner arguing that counsel was ineffective because of a failure to call a witness can only prove his claim by calling that witness to testify at the post-conviction hearing. See Pylant v. State, 263 S.W.3d 854, 869 (Tenn. 2008); see also Black v. State, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). Such testimony is usually necessary in order to allow the post-conviction court to evaluate whether the testimony is admissible, material, and credible. Pylant, 263 S.W.3d at 869-70. In Pylant, testimony from the actual witness was not necessary because there were alternative means of presenting the evidence to the post-conviction court. Id. But that is not the case here. Here, we have only Petitioner's assertions about what Ms. Taylor would have said. Such speculation is not sufficient for post-conviction relief.

Likewise, Petitioner has failed to demonstrate trial counsel was ineffective when he declined to call Ms. Gordon as a witness. As with Ms. Taylor, Ms. Gordon did not testify at the post-conviction hearing, and Petitioner presents no other avenue for evaluating the impact she may have had in the trial. Unlike with Ms. Taylor, Petitioner did not even attempt to speculate about what Ms. Gordon would have said, other than to say she owned the car. Indeed, at the post-conviction hearing, Petitioner acknowledged that he had no idea what Ms. Gordon would have said. Not knowing what Ms. Gordon would have said, the post-conviction court and this court cannot evaluate the proposed testimony's impact on the jury, let alone its admissibility, materiality, or Ms. Gordon's credibility. As a result, this argument fails. See Pylant, 263 S.W.3d at 869-70; Black, 794 S.W.2d at 757-58.

We are similarly unpersuaded by Petitioner's argument regarding trial counsel's cross-examination of Sergeant Mackall. Sergeant Mackall was called as an expert witness to provide testimony regarding the typical profile of drug dealers. As noted above, Sergeant Mackall approached trial counsel about an unrelated federal case that was then-pending before the United States Court of Appeals for the Sixth Circuit. Trial counsel referred Sergeant Mackall to another attorney. Petitioner contends that trial counsel failed to vigorously cross-examine Sergeant Mackall because of the relationship arising from the federal case. However, the only potential line of questioning identified in Petitioner's post-conviction testimony, trial counsel's post-conviction testimony, or Petitioner's brief to this

court concerns the allegations in the federal case. This, Petitioner argues, would have given the jury reason to discredit Sergeant Mackall's testimony.

We see neither deficient performance nor prejudice in this scenario. As trial counsel suggested at the post-conviction hearing, Sergeant Mackall's alleged use of excessive force on a dog during the execution of a drug-related search warrant is irrelevant to expertise in profiling drug dealers. Trial counsel was therefore within the bounds of competent counsel in declining to pursue a line of questioning that would likely have been prohibited as inadmissible.

Moreover, Petitioner has not shown that he was prejudiced by the absence of this line of questions. Petitioner was unable to specify how counsel should have questioned Sergeant Mackall. Further, trial counsel stated at the post-conviction hearing that the case was ultimately dismissed, but he did not know if it had been dismissed at the time of trial. Without more information about the evidence and the disposition of the case, we could only speculate regarding how the questioning would have been beneficial to Petitioner. Even if the jury was inclined to question Sergeant Mackall's credibility, his testimony was limited to his expert opinion about the typical drug dealer profiles. It did nothing to negate the overwhelming proof that the car Petitioner possessed contained a significant quantity of drugs. Petitioner has thus failed to meet his burden for post-conviction relief.

Finally, Petitioner contends that he was denied his constitutional right to a fair trial because of trial counsel's conflict of interest. But Petitioner admitted that he was advised of trial counsel's relationship with Sergeant Mackall and agreed to proceed with his representation anyway. Moreover, the section of the brief putting forth Petitioner's argument is essentially a rehash of his ineffective assistance claim. For the reasons discussed above, we are not persuaded that counsel was deficient or that his conduct prejudiced Petitioner. We are hard-pressed to see how counsel could have otherwise compromised Petitioner's right to a fair trial in any way. On the record before us, it appears trial counsel was diligent and zealous in his client's defense.

III. Conclusion

Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

_____

NORMA McGEE OGLE, JUDGE